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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 830

ROYAL WAYNE REA, *Petitioner*

v.

A. McDONALD, Warden
of the Federal Correctional Institution
at Texarkana, Texas
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner's
PETITION FOR REHEARING

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MAY IT PLEASE THE COURT:

To persuade one justice who concurred in the order denying certiorari to desire reconsideration and to aid four members of the Court to determine that the petition for writ of certiorari be granted, this petition for rehearing is filed and presented.

Grounds

1. The Court should have exercised its discretionary jurisdiction because the holding of the court below conflicts

with the former holdings of this Court in habeas corpus cases.

2. The Court should have exercised its discretionary jurisdiction because the court below departed so drastically from the usual and accepted procedure in habeas corpus cases as to call for the exercise by this Court of the power of supervision to halt the same and correct the injustice committed against petitioner.

Discussion

If the time has now been reached for this Court to hold that the petition for writ of habeas corpus is confined only to instances where the denial of the constitutional right can be established *dehors* the record and that it is not available to review the denial of constitutional rights established upon the face of the record and which can be urged upon appeal from a conviction, then such a holding so far departs from the accepted and usual course of judicial proceedings in habeas corpus cases as to justify the granting of the writ of certiorari so as to clarify the law.

If this contention of the Government is applicable and is correct then this Court should explicitly so declare.

If it is not correct then it is unjust to let the decision below stand. Granting certiorari here is necessary to preserve justice and a uniformity in the decisions. It will avoid a multiplicity of actions and appeals to settle the matter now rather than to let it rest obscured in the confusion that results through denial of the petition for writ of certiorari in this case.

It has been uniformly held that failure to take an appeal is not a waiver of the denial of constitutional rights where the deprivation of the rights is sufficient to violate the due process clause. Such denials oust the court of jurisdiction to impose sentence. *Bowen* v. *Johnston,* 306 U. S. 19, 23-25, 26, 27; *Johnson* v. *Zerbst,* 304 U. S. 458, 468.

Whether there has been a denial of due process by the

convicting court in refusing Rea the right to challenge the legality of the administrative order supporting the indictment is a sufficiently substantial question to require the granting of the writ of certiorari. (*Estep* v. *United States,* 66 S. Ct. 423, concurring opinions of MURPHY, J. and RUTLEDGE, J.) The petitioner urges that he has been denied due process of law upon the trial so as to oust the convicting court of jurisdiction to impose sentence. The decision of the courts below that there was no denial of due process is in direct conflict with the decisions of this Court. *McVeigh* v. *United States,* 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278-279; *Hovey* v. *Elliott,* 167 U. S. 409, 413-415, 417-418; *Bradstreet* v. *Neptune,* 3 Sumn. (U. S.) 600; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Chicago M. & S. P. R.* v. *Minnesota,* 134 U. S. 418, 456-457. Cf. *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944.

The judgment of conviction imposed against petitioner upon his trial, where there has been a denial of a fundamental constitutional right to due process of procedural law, is a nullity and subject to collateral assault, including attack by habeas corpus. The decisions of the courts below that the judgment of conviction is not subject to collateral attack are directly in conflict with *National Exchange Bank* v. *Wiley,* 195 U. S. 257; *Old Wayne Life Ass'n* v. *McDonough,* 204 U. S. 8, 23; *Baker* v. *Baker Eccles & Co.,* 242 U. S. 394, 401; *Griffin* v. *Griffin,* 66 S. Ct. 556, 560.

It is respectfully submitted that the decision of the court below is in direct conflict with *Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Ex parte Hans Nielsen,* 131 U. S. 176, 184-185; *Waley* v. *Johnston,* 316 U. S. 101; *Smith* v. *O'Grady,* 312 U. S. 329; *Frank* v. *Mangum,* 237 U. S. 309, 330-331, 335; *Moore* v. *Dempsey,* 261 U. S. 86, 91; *Ex parte Wilson,* 114 U. S. 417; *Ex parte Bain,* 121 U. S. 1; *Callan* v. *Wilson,* 127 U. S. 540; *Walker* v. *Johnston,* 312 U. S. 275; *United States ex rel. McCann* v. *Adams,* 320 U. S. 220, 221; *Adams*

v. *United States ex rel. McCann,* 317 U. S. 269; *In re Rosier,* 76 U. S. App. 214, 133 F. 2d 316, 322-324; *Jones* v. *Huff,* decided by the United States Court of Appeals for the District of Columbia, Nov. 25, 1945, 14 L. W. 2335-2336; *Clowans* v. *Rives,* 104 F. 2d 240; *Jones* v. *Kentucky* (CCA-6) 97 F. 2d 335; *Manning* v. *Biddle,* 14 F. 2d 518; *Potter* v. *Dowd* (CCA-7) 146 F. 2d 244.

In *Ex parte Hans Nielsen* (1889) 131 U. S. 176, 184-185, the error of the court in permitting a trial by information rather than by indictment was apparent of record and could have been raised upon appeal. This was also true in *Ex parte Bain* (1887) 121 U. S. 1, where the defendant was convicted under an indictment amended without return to the grand jury. In each decision the writ of habeas corpus was held to be available despite the right to raise these questions upon appeal, which was not resorted to.

The denial of trial by jury in *Callan* v. *Wilson,* 127 U. S. 540, could have been presented upon appeal. Also the error of the court in denying trial by jury was apparent of record. Nevertheless the writ of habeas corpus was granted.

The illegal denial of counsel is apparent of record: Moreover the denial of counsel can be raised upon appeal. Nevertheless the courts have uniformly held that the writ of habeas corpus is available to discharge a prisoner who has been convicted without counsel contrary to the due process clause. *Johnson* v. *Zerbst,* 304 U. S. 458, 468.

In every one of the above cases the error of the court was considered to be grave and serious. The errors were not mere procedural errors. They violated the fundamental law of the land. The judgment in each case had been obtained contrary to the Constitution so as to make the conviction subject to collateral attack.

If there has been a denial of due process in the manner claimed by petitioner, such can be considered at any time in collateral habeas corpus proceedings. The denial of a hearing contrary to the due process clause vitiates the

entire proceedings and ousts the convicting court of jurisdiction, making the sentence void and subject to collateral attack. These are substantial questions.

It is highly unjust to let the issues stand without determination.

Although there are several thousand of Jehovah's witnesses in prison, only a very few, probably not more than twenty, are in a position like Smith and Estep which should enable them to assert the denial of due process. Most of Jehovah's witnesses now incarcerated are there because of their failure to report for induction into the armed forces. In almost every case there has not been a completion of the selective process. Under the circumstances the granting of certiorari in this case would not unduly burden the courts. Furthermore, the mere inconvenience of the courts in hearing petitions for writs of habeas corpus is not sufficient ground for approval of the illegal restraint of citizens convicted in violation of the due process clause. Only those men who stand in the position of Smith and Estep and who have exhausted their administrative remedies are in a position to contend that they are being held in violation of the due process clause. Men who have been convicted for failure to complete the selective process are not in a position to assert a violation of the due process clause.

This petition for writ of certiorari presents grave questions. Grounds for the granting of the petition are to be found in the language of the *Estep* opinion itself: "But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow. . . . But the fact that *habeas corpus* after conviction is available in these cases gives added support to our reading

of § 11. It supports a rejection of a construction of the Act that requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again." (66 S. Ct. 423, 428-429)

It should be remembered that the court below held that petitioner "could not defend at his trial on the ground that the local board had no jurisdiction". Therefore petitioner asserts that "the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus.*"

"It is true that after conviction of the defendant in the *Falbo* case, his petition for a writ of *habeas corpus* was denied. 141 F. 2d 689. And in a like situation *habeas corpus* was denied in advance of the trial. Albert *v.* Goguen, 141 F. 2d 302. But in those cases additional steps in the selective service procedure remained to be taken. Denial of *habeas corpus* followed by analogy to the familiar situations where other corrective procedures had been available which might have afforded relief from the orders complained of. See Bowen *v.* Johnston, 304 U. S. 19; Ex parte Williams, 317 U. S. 604; Ex parte Hawk, 321 U. S. 114. But in the present cases the registrants, as we have said, had pursued their administrative remedies to the end." (See Note 17, page 8, slip opinion, *Estep* v. *United States,* 66 S. Ct. 423, 428-429)

Conclusion

WHEREFORE, petitioner prays that, upon consideration hereof, the order heretofore denying certiorari be vacated and set aside and an order be entered granting certiorari as prayed for in the petition for writ of certiorari.

ROYAL WAYNE REA, *Petitioner*

By HAYDEN C. COVINGTON, *His Counsel*

Certificate

I, the undersigned counsel for petitioner, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner